No. 82-213

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 633 of NEW HAMPSHIRE, et al.,

Petitioners,

versus

JONES MOTOR CO., INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED[1]

1. Whether a Court of Appeals which reverses a District Court's decision that it is not the appropriate forum for a dispute may order summary judgment for the appellant where the merits of the dispute were not addressed by both parties in the Court of Appeals.

2. Whether procedural due process prohibits an appellate court from ordering summary judgment for an appellant without providing the appellee the opportunity to address the merits of the dispute.

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1 In addition to the Local Union, Antonio Chloros and Leo Kelly were parties below individually and in their official capacities as Secretary-Treasurer and Business Representative, respectively. They are also Petitioners herein.

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In The

Supreme Court of the United States

October Term, 1982

Chauffeurs, Teamsters and Helpers,
Local Union No. 633 of New Hampshire, et al.,

Petitioners,

vs.

Jones Motor Co., Inc.

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

Petitioners, Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Antonio Chloros and Leo Keily, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on April 8, 1982, which reversed and remanded a decision of the United States District Court for the District of New Hampshire.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 38. It is reproduced *infra*, Appendix ("App.") B.

The initial opinion of the United States District Court for the District of New Hampshire, dated February 19, 1981, is unreported and is reproduced *infra*, App. D. The opinion denying Plaintiff's Motion for Reconsideration, dated April 20, 1981, is unreported and is reproduced *infra*, App. C.

JURISDICTION

The initial judgment of the Court of Appeals was entered on February 19, 1982 (App. B1). The Court of Appeals denied Local 633's petition for rehearing on April 1, 1982 (App. A1) and issued its Mandate on April 8, 1982. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. §185(a)) provides, in pertinent part:

> §185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship. Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Facts

On December 18, 1979 Roger Pellerin was scheduled to work on the loading platform of the Company's Nashua,

New Hampshire freight terminal. Pellerin's shift began at 6:00 p.m. and ended at 2:30 a.m. with a half-hour lunch break from 11:30 p.m. to 12 midnight. Another employee, Filteau, was scheduled to work the same shift and two other employees worked a shift which began at 11:00 p.m.

That night was the third successive night of sub-zero weather. The loading area where Pellerin and Filteau worked was open to the sub-zero weather and had a temperature equivalent to the outside. Joseph Lacourse, supervisor/dispatcher for the Company, allowed Pellerin and Filteau to enter a heated coffee area (something they were normally not allowed to do) to warm-up on five or six occasions during the course of the evening because he knew how cold they were and because they said they were cold.

At approximately 8:30 p.m., Filteau came into the office and told Lacourse that he was "sick," and would try to "stick it out" as long as he could, but wanted Lacourse's permission to go home early. At approximately 10:00 p.m. Filteau asked for, and Lacourse granted him, permission to go home (A. 76-77). Lacourse then wrote in his log that, "Filteau went home sick at 2200."

Pellerin kept on working the loading dock by himself. From time to time he came into the office to try to warm-up; he made no further complaint about the cold, but Lacourse noted they did not have to complain about the cold, "it was obvious." Pellerin did not stop for lunch at 11:30 but instead continued working with the two newly arrived employees for another fifteen minutes.

At 11:45 p.m. Pellerin entered the office and informed Lacourse that he was frozen, that the cold was going right through him, that he was going home because he could not take it anymore and that he would not be back for the balance of the shift. Pellerin took Lacourse's basic silence as consent and punched out for the evening. Subsequently Lacourse entered in his log book that "Pellerin went home at 2345 frozen," and did not write "quit."

When Pellerin arrived for work the next day, his time card had been removed from the rack and he was not permitted to work. Lacourse told him that, in the Company's opinion, he had quit the night before.

Local 633 took the position that Pellerin had not quit, but had gone home sick, and that the Company had "discharged" him without first discussing the disciplinary action with Business Agent Leo Kelly as required by Article 46, Section 5 of the contract between the Company and the Union.[2]

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2 The Company and Local 633 are parties to the National Master Freight Agreement and the Northern New England Supplemental Agreement. Article 46, Section 5 states, in pertinent part:

> (a) Scope of Procedure
>
> Prior to the taking of any other than emergency action as contained in Sections (b) and (c) below, including resort to any court or administrative agency or tribunal, by either Employer or the Local Union, all grievances or disputes shall be taken up and considered by the Employer and the Union Business Agent who shall make every attempt to settle same.
>
> (b) No Disciplinary Action
>
> The Employer shall take no disciplinary action other than emergency action against an employee, or group of employees, until after Section 5(a) above has been complied with in good faith. Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then either party may take the unresolved question to arbitration as herein provided.
>
> . . .
>
> (d) Must Submit
>
> Failure of Employer to comply nonarbitrable. Telegraphic request. All disputed complaints, or grievances, and any and all claims, demands, or actions growing therefrom, or involved therein, which are covered by terms of this contract, or which pertain to labor relations between the contracting parties, regardless of whether or not they are covered by the terms of this contract, and which the Employer has

(Continued)

Pursuant to its interpretation of Article 46, Local 633 threatened to strike if the Company did not reinstate Pellerin and then arbitrate the propriety of discipline. The Company maintained that Pellerin had quit, but indicated that it would submit to arbitration without reinstating Pellerin.

On December 27, 1979, Local 633 struck and established a picket line at the Company's terminal. On January 3, 1980, the Company filed the instant action seeking an injunction and damages. The strike ended the next day. Nevertheless, the Company continued to litigate its demand for damages.

At the same time that it ended the strike, the Local submitted a grievance on behalf of Pellerin to the contract arbitrators, the Northern New England Joint Area Committee. The arbitrators deadlocked. Pursuant to Article 46(1)(b) of the Supplemental Agreement, the grievance was then submitted to another arbitrator, the Eastern Conference Joint Area Committee. That body decided that Pellerin should be reinstated with full seniority on June 2, 1980, but that the preceding six months should be considered as a suspension for which no compensation, health and welfare, or pension contributions would be made. The Committee also decided to issue a final warning letter to Pellerin for walking off the job.

(2 Continued)

> tried and been unable to settle with the Business Agent as per Section 5 (a) of this Article shall be submitted to the Joint Area Committee by the complaining party. Failure on the part of an Employer to comply with Section 5 of this Article shall be a violation of this Agreement and shall not be arbitrable by the Joint Area Committee, nor shall the provisions of Section 1 of this Article apply provided, however, that a written telegraph request by the Union to the home office of the Employer involved is made.

Article 46, Section 1, mentioned in Section 5(d), is the no strike clause.

B. The District Court Decision

Local 633 and the Company filed motions for summary judgment on the merits of the dispute: whether the strike had breached the no-strike clause in the contract. *Sua sponte*, however, the District Court held that it was "an inappropriate forum for the resolution" of the dispute and referred to the parties to arbitration on the issue of breach of contract and damages (App. D11). In denying the Company's motion for reconsideration, the Court rejected arguments that the contract did not **require** the arbitration of such issues and that Local 633 had waived any right to insist upon arbitration instead of litigation (App. C4, 7-8).

C. The Court of Appeals Decision

The Court of Appeals held that regardless of whether the contract had required the arbitration of the Company's claim, Local 633 had waived its right to demand arbitration by defending the damage action on its merits without ever raising the issue of arbitrability (App. B7-12). Rather than remanding to the District Court for a determination of the merits of the disupte, the Court of Appeals decided the issue of liability (App. B12). It concluded that the issue of Pellerin's reinstatement was presumptively arbitrable and that Local 633 could not unilaterally determine that the no-strike and arbitration clauses did not apply (App. B14-15). Accordingly, the Court reversed and remanded to the District Court with instructions to enter summary judgment in favor of the Company and to determine the amount of damages.

REASONS FOR GRANTING THE WRIT

I. The Procedure Below Conflicts with Procedures Followed in the Third and Fifth Circuits and is Contrary to Decisions of this Court

In *United States v. Ballard*, 322 U.S. 78, 88 (1944), the Court remanded rather than decide issues not adequately presented to the Court. The Court reasoned that

> the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances, we deem it appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. . . . If any questions of importance survive and are presented here, we will then have the benefit of views of the Circuit Court of Appeals.

See also: Brown v. Fletcher, 237 U.S. 583, 588 (1915).[3] In *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 385-386 (1960), the Court requested supplemental briefs in response to questions raised, *sua sponte*, by the Court.

This petition asks the Court to determine whether a court of appeals has a similar obligation to remand or to request supplemental briefs where "questions were not fully presented [to the court of appeals] in the briefs or oral argument."

This question falls within the penumbra of two prior decisions of the Court. In *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), the Court held that "[a] successful party in the District Court may sustain its judgment on any ground that finds support in the record." However, in *Fountain v. Filson*, 336 U.S. 681, 683 (1949), the Court held that, on reversal of a summary judgment, an appellate court could order summary judgment for the appellant only after affording the appellee a fair opportunity to "dispute the facts material" to the new theory of decision. Here, the District Dourt denied cross-motions for summary judgment and dismissed the complaint for lack of jurisdiction. The Court of Appeals found jurisdiction but entered summary

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3 In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 234 (1938), the Court held that procedural due process "assumes that appellate review does afford opportunity to present all available defenses. . . ."

judgment for the Company without entertaining a full discussion of the merits of the case, thereby depriving Local 633 of a fair opportunity to present its case on the merits of the dispute.

The First Circuit's treatment of the case contrasts sharply with the practice in the Third and Fifth Circuits. Those courts request supplemental briefs to address issues raised by the court. *Local 334, United Association v. United Association*, 628 F.2d 812, 813 (3d Cir. 1980), *rev'd on other grounds*, 452 U.S. 615 (1981); *Cox v. Operating Engineers*, 672 F.2d 421, 422 (5th Cir. 1982); *Bishop v. NLRB*, 502 F.2d 1024, 1025 (5th Cir. 1974). In contrast, the First Circuit, presented with a jurisdictional question on appeal determined the merits of the case despite only a cursory presentation by the parties.[4] The First Circuit failed to "proceed cautiously" while reaching an issue not addressed by the District Court. *United States v. General Motors*, 518 F.2d 420, 441 (D.C. Cir. 1975).

The Court of Appeals reached the merits of the case, rather than remanding, because "both sides submitted this case to the district court for summary decision and [because] the case raises a single issue of contract interpretation." (App. B12). However, the absence of multiple issues for interpretation does not dispense with the need for analysis by the parties on the "single issue" presented. Furthermore, it is well-settled that

> [t]he filing of cross-motions for summary judgment does not necessarily concede the absence of a material issue of fact. This must be so because by the filing of a motion a party concedes that no issue of fact exists under

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4 The Company devoted but two pages in 37 pages of briefs to its argument that the District Court should have granted its motion for summary judgment. Local 633 did not address the issue. Oral argument was devoted to the question of arbitrability squarely presented by the parties.

> the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted.

Nafco Oil and Gas, Inc. v. Appleman, 380 F.2d 323, 324-325 (10th Cir. 1967). *See also: United States v. Article of Device...*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670, 673-674 (4th Cir. 1967); *American Fidelity & Cas. Co. v. London & Edenburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965).

The Court of Appeal's treatment of this case deprived Local 633 of the opportunity to argue several significant points. Local 633 had argued to the District Court that the Company had discharged Pellerin without first arbitrating the propriety of discipline as required by Article 46, Section 5(b) of the contract. The Company had argued that Section 5(b) was inapplicable because Pellerin had quit and was not disciplined. If Pellerin had been discharged prior to arbitration, Section 5(d) states that the Company's violation of Section 5(b) is not arbitrable **and** that the no strike clause is inapplicable. Thus, if Pellerin was discharged, the strike was lawful. Both the District Court (App. D9) and the Court of Appeals (App. B14) explicitly refused to decide the "discharge-quit" issue. Instead, the Court of Appeals held that the issue was presumptivley arbitrable and that Local 633 should have arbitrated (App. B14).

The First Circuit's analysis ignores the post-strike decision of the Eastern Conference Joint Area Committee, contrary to the holdings of the Fourth, Seventh and Eighth Circuits. According to the First Circuit, the explicit arbitrable issue was whether Pellerin quit or was discharged, and, implicitly, whether the no-strike clause applied. By ordering Pellerin's reinstatement without backpay and with a final warning, the Committee necessarily considered Pellerin to

have been discharged.[5] The Fourth, Seventh and Eighth Circuits have held that post-strike arbitration awards may be conclusive proof either that there was no breach or that there were no compensible damages. *Valmac Industries, Inc. v. Meat Cutters Local 425*, 519 F.2d 263, 269 (8th Cir. 1975) *vacated on other grounds*, 428 U.S. 906; *Associated Contractors v. Local 563, Laborers*, 519 F.2d 269, 271 (8th Cir. 1975); *Western Publishing Co. v. Graphic Arts Union*, 522 F.2d 530, 533 (7th Cir. 1975), *cert. denied*, 423 U.S. 1088; *Cedar Coal Co. v. Mine Workers*, 560 F.2d 1153, 1172-1173 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047; *Pilot Freight Carriers, Inc. v. Teamsters*, 659 F.2d 1252, 1258-1259 (4th Cir. 1981). Thus, while it would have been safer to arbitrate instead of striking, Local 633 gambled on its interpretation of the facts and the Committee sustained Local 633's position, at least in part. It is axiomatic in labor relations that a party may unilaterally act upon its interpretation of the contract and that a subsequent arbitration award either awards damages from the outset or validates the action *nunc pro tunc*. This axiom applies both in discipline cases and in strike damage actions. In other words, if the Company had discharged Pellerin, the subsequent strike was lawful; but if Pellerin had quit and the Company had merely refused to rehire him, the subsequent strike was unlawful. The court of appeals should not have based its finding that the strike was unlawful on the mere fact that the quit-discharge issue itself was arbitrable while ignoring the subsequent arbitration which had resolved that issue.

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5 As the party opposing the motion for summary judgment, Local 633 is entitled to all favorable inferences drawn from undisputed facts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Of course, if the Company disputes this interpretation by raising a factual issue, the entry of summary judgment was erroneous.

CONCLUSION

For the reasons stated herein, we respectfully urge the Court to grant a Writ of Certiorari in this case.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1341

JONES MOTOR COMPANY, INC.,
Plaintiff, Appellant,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 633 OF NEW HAMPSHIRE,
ETC., ET AL.,
Defendants, Appellees.

Before COFFIN, Chief Judge,
CAMPBELL, BOWNES and BREYER, Circuit Judges,
BONSAL*, Senior District Judge.

ORDER OF COURT

Entered April 1, 1982

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

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*Of the Southern District of New York, sitting by designation.

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

DANA H. GALLUP, Clerk.

By: _____
Chief Deputy Clerk.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 81-1341

JONES MOTOR COMPANY, INC.,

PLAINTIFF, APPELLANT,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 633 OF NEW HAMPSHIRE, ETC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[HON. SHANE DEVINE, *U.S. District Judge*]

Before

BOWNES and BREYER, *Circuit Judges*,
and BONSAL,* *Senior District Judge.*

Philip J. Moss, with whom *Morgan, Brown, Kearns & Joy* was on brief, for appellant.

Robert Christy, with whom *Christy and Tessier* was on brief, for appellees.

February 19, 1982

BREYER, *Circuit Judge*. Jones Motor Company (the "Company") appeals from a decision of the United States District Court for the District of New Hampshire denying the Company's motion for summary judgment and dismissing its complaint. The Company contends that the district court erred both (1) in holding that its claim against Chauffeurs, Teamsters and Helpers, Local Union No. 633 (the "Local") for damages arising from a strike, allegedly illegal under the parties' collective bargaining agreement, was subject to arbitration, and (2) in denying its motion for summary judgment. We agree, reverse, and remand.

* Of the Southern District of New York, sitting by designation.

I

The facts are largely undisputed. The Company, a Pennsylvania corporation, is an interstate trucking company with a freight terminal in Nashua, New Hampshire. The Local is an International Teamsters Union affiliate. The Company and the Local have signed a collective bargaining contract that has two separate sets of provisions. One set consists of the "National Master Freight Agreement" — a set of provisions found in Teamster contracts throughout the Nation. The second set consists of the "Northern New England Supplement" — separate local provisions found in New England Teamster contracts. This case rests upon claims by each party that the other has violated the contract ("Master" plus "Supplement") in effect between them.

The strike that the Company claims unlawful arose as follows: On the night of December 18, 1979, Roger Pellerin, a Local member, began his 6:30 p.m. to 2:30 a.m. workshift on the loading platform of the Company's Nashua, New Hampshire, freight terminal. It was a very cold night. At approximately 8:30 p.m. Filteau, another employee, entered the office of the supervisor, Joseph Lacourse, and said that he was sick; at 10:00 p.m. Filteau was granted permission to leave early. Pellerin continued to work by himself, occasionally entering the office to warm up. Pellerin did not stop working at 11:30 p.m. for his usual meal break, but at approximately 11:45 p.m. he entered Lacourse's office, had a brief conversation with Lacourse, punched his time sheet, and left. What Pellerin said to Lacourse before leaving is a matter of dispute. Lacourse in his affidavit of December 28, 1979, recalls that Pellerin "told me that he was leaving and was not coming back." Pellerin's version is that he felt frozen, weak, chilled to the bone, and that

> I skipped my scheduled luncheon break and reported to supervisor Joseph Lacourse in the dispatcher's room that I was frozen, the cold was going right through me and had to go home because I couldn't take it anymore

and wouldn't return for the balance of the shift. I interpreted Lacourse's basic silence as consent and went home at approximately 11:45 p.m. before my shift would otherwise have terminated at approximately 2:30 a.m.

Lacourse recorded in the Company log book that Pellerin went home frozen.

The next day the terminal manager, Arthur Dunham, conferred with Lacourse and the Local's shop steward, Roland Bouffard, about these events. According to Dunham, Bouffard felt that Lacourse's version of the facts showed that Pellerin had voluntarily quit. Dunham then instructed Lacourse that Pellerin was not allowed back to work. When Pellerin reported to work at 6:00 p.m., he asked Lacourse where his time card was. Lacourse responded that, in the opinion of the Company, Pellerin had voluntarily quit the night before.

The Local then took the position that Pellerin had not quit, but had gone home sick, and that the Company had thus "discharged" him without first discussing the disciplinary action with the Local Business Agent, Leo Kelly, as required by the Supplemental Agreement Article 46(5)(a) and (b).[1] On

[1] Supplemental Agreement, Article 46(5)(a) and (b):

(a) Scope of Procedure

Prior to the taking of any other emergency action as contained in Sections (b) and (c) below, including resort to any court or administrative agency or tribunal, by either the Employer or the Local Union, all grievances or disputes shall be taken up and considered by the Employer and the Business Agent who shall make every attempt to settle same.

(b) No Disciplinary Action

The Employer shall take no disciplinary action other than emergency action against an employee, or group of employees, until after Section 5(a) above has been complied with in good faith. Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then either party may take the unresolved question to arbitration as herein provided.

December 20, 1979, the Company received a telegram from the Local threatening unspecified action against the Company unless it reinstated Pellerin. On December 26, 1979, Kelly telephoned Charles Long, the Company's vice-president for labor relations, to advise him that the Local would take economic action, unless the Company immediately reinstated Pellerin. Long responded that it was his understanding that Pellerin had quit and stated that the Company was willing to have the question of Pellerin's status submitted to the arbitrator specified in the contract, namely, the Northern New England Joint Area Committee, scheduled to meet on January 4, 1980. Kelly refused this suggestion.

On December 27, at approximately 7:00 a.m., Kelly called a strike and established a picket line in front of the Company's Nashua terminal. The Company then sent a telegram to the Local urging it to terminate the strike and submit the dispute over Pellerin's status to arbitration. On January 3, 1980, the Company filed an action in federal distict court, claiming that the strike was illegal under the collective bargaining contract and seeking an injunction and damages.[2] The strike ended the next day.

At the same time that it ended the strike, the Local submitted a grievance on behalf of Pellerin to the contract arbitrators, the Northern New England Joint Area Committee. The arbitrators deadlocked. Pursuant to Article 46(1)(b) of the Supplemental Agreement, the grievance was then submitted to another arbitrator, the Eastern Conference Joint Area Committee. That body decided that Pellerin should be reinstated with full seniority on June 2, 1980, but that the preceding six months should be considered as a suspension for which no compensation, health and welfare, or pension constributions would be made. The Committee also decided to issue a final warning letter to Pellerin in reference to walking off the job.

[2] The Company also filed a motion for temporary restraining order, which was set down for hearing on January 8, 1980. Hearing on this motion was cancelled when the strike was terminated.

Meanwhile, the Company, while recognizing that its request for an injunction against the strike was moot, continued to press its district court claim for damages. The Local answered the complaint on the merits and both sides engaged in discovery. On the basis of the pleadings, the contract, answers to discovery requests, and affidavits, each side then moved for summary judgment. Neither side sought to present any additional evidence. The court heard oral argument on the summary judgment motions. Instead of deciding the summary judgment question, however, the court *sua sponte* decided that the basic issue in the case — which side breached the contract — should be submitted to arbitration, a matter that neither party had previously raised. And, it dismissed the complaint.

The Company moved for reconsideration, arguing that the collective bargaining agreement nowhere requires it to seek arbitration of its claim, and that even if the agreement required submission to arbitration, the Local had waived its right to insist on arbitration by proceeding on the merits in court. The district court rejected both arguments and reaffirmed its earlier decision. The Company then appealed to this court, arguing (1) that the district court erred in finding that the Company *must* submit its damage claim to arbitration, (2) that the district court erred in finding that there was no waiver by the Local of its right to insist on arbitration, and (3) the district court erred in failing to grant the Company's motion for summary judgment. We do not pass on the Company's first claim of error, but we believe that the second and third claims of the Company are correct.

II

We meet at the outset the question of whether the district court erred in dismissing the complaint on the ground that the collective bargaining agreement required that the matter be submitted to arbitration. The parties have vigorously

argued various interpretations of the provisions in both the Master Agreement and the Supplement governing an employer's remedies in the case of an illegal strike.[3] We do not

[3] The question of whether the Company would, in the normal course, be required to submit its claim that the strike by the Union violated the collective bargaining agreement before coming to court to seek damages is not a simple one. The Master Agreement clearly establishes that the employer must first obtain a finding of liability by an arbitrator before seeking court-ordered damages:

> [T]he question of whether the International Union, Teamsters National Freight Industry Negotiating Committee, an Area Conference, Joint Council or the Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of the Agreement by calling, encouraging, assisting or aiding such work stoppage, etc., in violation of this Agreement ... shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action.

Master Agreement Article 8(2)(c). The Supplemental Agreement, however, is not so strongly pro-arbitration. Article 46(1)(f) of the Agreement provides that "[n]othing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." This clause, the "nothing herein" clause, has a long history of inclusion in pre-1970 versions of the Master Agreement in which it was consistently interpreted as permitting an employer to go directly to court rather than to arbitration with a claim based on an allegedly illegal strike. *Stillpass Transit Company* v. *Ohio Conference of Teamsters*, 382 F.2d 940, 942 (6th Cir. 1967); *Mason-Dixon Lines, Inc.* v. *Teamsters, Local 560*, 443 F.2d 807 (3d Cir. 1971); *California Trucking Ass'n* v. *Teamsters* [*1*], 86 L.R.R.M. 2643, 2647 (N.D. Cal. 1974); *Granny Goose Foods, In. Teamsters*, 88 L.R.R.M. 2029, 2030 n.3 (N.D. Cal. 1974); *California Trucking Ass'n* v. *Teamsters* [*5*], 94 L.R.R.M. 2981, 2984 (N.D. Cal. 1977). After being deleted from the Master Agreement in 1970 (at which time it was replaced by language similar to that currently found in Article 8(2)(c)), the "nothing herein" clause was retained in at least some Supplements. In this context it was still interpreted to permit direct employer access to courts. *Pilot Freight Carriers* v. *Local 391*, 97 L.R.R.M. 3223 (M.D.N.C. 1977). Given this consistent history of interpretation, the pointed change in the Master Agreement, and the retention of the exact language of the deleted "nothing herein" clause in the Supplement, it is clear that the Master Agreement and the Supplement conflict with regard to the issue of employer access to court and that resolution of the issue would necessarily involve determining which agreement,

need to pass on these arguments because we believe that no matter what procedures were or were not required under the collective bargaining agreement, the Local has by its conduct in court waived any right that it might have to insist on arbitration.

The Local did not promptly request arbitration as to the strike's legality. Nor has it as yet acted to enforce any rights it may have under the contract to arbitrate this issue. The Company filed its complaint on January 3, 1980, and amended it on January 21, 1980. The Local answered the complaint, admitting jurisdiction on January 23, 1980. The individual defendants-appellees answered on May 23, 1980, also admitting jurisdiction. Depositions were taken (three by the Company and one by the Union) and a pretrial conference was held on July 2, 1980. The parties then filed cross-motions for summary judgment on the merits, briefed the merits, and had oral arguments on the merits on October 24, 1980. At no time during these proceedings did anyone mention arbitration. Rather, the first time arbitration was mentioned was more than a year after the Local filed its answer. That was February 19, 1981, when the district court decided, evidently completely on its own, that the issue should be heard by arbitrators, and dismissed the case.

Despite the policies favoring arbitration of contractual disputes, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957), *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), it has long been held that parties are free to waive their rights to arbitration under a

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Master or Supplement, prevails in the case of a conflict. Neither the agreements nor the above-cited cases are clear on this point, and the policies involved — preservation of the uniformity of the national agreement versus enforcement of the intentions of the parties which might be more accurately represented in the local agreement — are also at odds. Because we can decide this case without reading this question, potentially of great importance to the interpretation of the collective bargaining agreement in many respects, we express no view upon its merits.

contract and proceed to present their contractual dispute to a court. *Steelworkers* v. *Warrior & Gulf*, 363 U.S. at 582; *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964). Moreover, such a waiver need not always be express; rather, courts can infer a waiver from the circumstances. *E.g.*, *E. T. Simonds Construction Co.* v. *Local 1330, International Hod Carriers*, 315 F.2d 291 (7th Cir. 1963). In fact, in *Simonds* the Seventh Circuit warned that a party must "proceed with dispatch in seeking arbitration" if it does not wish to waive that right. And, the court there refused to stay court proceedings to allow arbitration of an "illegal-strike damages" claim when the parties seeking arbitration had previously (1) admitted jurisdiction in its answer to the complaint and (2) did not move for arbitration until four days after the pretrial conference, almost a year later. Similarly, in *Bath Marine Draftmen's Ass'n* v. *Bath Iron Works Corp.*, 266 F. Supp. 710 (D. Maine 1967), *aff'd with modifications*, 393 F.2d 407 (1st Cir. 1968), the district court found that the union, by not raising the issue of arbitration until during oral argument on the merits, had not "proceeded with dispatch in seeking arbitration" and had therefore waived arbitration.

The Supreme Court case of *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), however, warns us against being overready to find a waiver. In that case, the company argued that the union had abandoned the agreement, which contained an arbitration clause, by failing to enforce it over a period of years. The Court held that the issue of laches was itself a matter for arbitration under the broad arbitration clause of the agreement. Similarly, this circuit in *General Dynamics Corp.* v. *Local 5, Industrial Union of Marine Workers*, 469 F.2d 848 (1st Cir. 1972), rejected a company claim that a union had repudiated an agreement's arbitration provision by refusing to comply with a previous arbitration order to cease and desist from work stoppage. And in *H. & M. Cake Box, Inc.* v. *Bakery and Confectionery Workers, Local 45*, 493 F.2d 1226 (1st Cir. 1974), we rejected

an employer's argument that the union's strike effectively amounted to a repudiation or waiver of the arbitration clause, effectively relieving the company of any duty to proceed to arbitration. Nonetheless, these cases do not hold or imply that parties can never waive arbitration or express a waiver in a course of conduct.

In these three cases, *Flair Builders*, *General Dynamics*, and *H. & M. Cake Box*, the conduct that allegedly amounted to a waiver or equivalent arbitration bar occurred *before* the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts, under the contract's standards, should bar arbitration).[4] In contrast, the conduct allegedly constituting waiver here simply consists of a failure to seek arbitration while acquiescing in court resolution of the dispute. These facts took place *after* the complaint was filed; and the question of whether they amount to waiver calls for the expertise of a judge, not an arbitrator. Moreover, to require that parties go to arbitration despite their having advanced so far in court proceedings before seeking arbitration would often be unfair, for it would effectively allow a party sensing an adverse court decision a second chance in another forum. Further, to hold that courts *cannot* find waiver would waste scarce judicial time and effort. Finally, it is important that judges remain free to control the course of proceedings before them and to correct any abuse of those proceedings by, for example, denying a belated motion for arbitration.

For these reasons, we agree with the Tenth Circuit's holding in *Reid Burton Construction, Inc.* v. *Carpenters*

[4] It should also be noted that in *General Dynamics* and *H. & M. Cake Box* the defendants promptly raised the question of arbitration as a bar to judicial relief. Although that fact is not noted in either published opinion, the Company has brought the parties' briefs in those cases to the attention of this court. In those briefs it is clear that the union in *General Dynamics* raised arbitration as a bar in a motion to dismiss immediately following the filing of the complaint and that the union in *H. & M. Cake Box* raised the issue in its answer and again in its motion for summary judgment.

District Council, 535 F.2d 598 (10th Cir. 1976) (*Reid Burton I*), that *Flair Builders* was not intended to limit the power of a court to control proceedings before it. In that case, focusing on post-complaint actions by the parties, the Tenth Circuit affirmed the continued validity of *Simonds* and *Bath Iron Works*. In reversing the district court's holding that the issue of whether post-complaint actions amounted to waiver was required to be submitted to arbitration, the Tenth Circuit said:

> The equitable defense in the instant case arose from alleged 'evasive' and 'dilatory' pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court.

Id. at 603. *Flair Builders*, in the Tenth Circuit's view, is limited to the "proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a grievance. . . ." *Id.*[5]

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[5] Neither *Flair Builders* nor *Reid Burton I*, nor indeed this case, raises the issue of an arbitration clause that provides for arbitration of a claim of "waiver through court proceedings." But, in any event, the *Reid Burton I* court wrote:

> [T]he language of Article XIII was broad enough to include disputes dealing with violations of the no-strike provision and would probably cover the type of laches defense raised in *Flair Builders*, but we do not believe that the parties ever intended to include the arbitration of equitable defenses arising out of actions by a party in proceedings before a district court. Indeed, even had the parties so intended, we would conclude that such an agreement would clearly exceed the proper subject matter of a collective bargaining agreement and would not be enforceable in court. . . .

535 F.2d at 604.

In sum, there is no question but that the court had the power to find a waiver on the facts before it. Although a district court has a degree of discretion in determining whether or not to find a waiver, in this instance it would have been error to grant a motion seeking arbitration, and even more so to order arbitration *sua sponte*. The standards followed by the federal courts are set out in *Reid Burton Construction, Inc.* v. *Carpenters District Council*, 614 F.2d 698 (10th Cir. 1980) (*Reid Burton II*):

> In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right, . . . whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff, . . . whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand. . . .
>
> Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings, . . . whether important intervening steps [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration . . .] had taken place, . . . and whether the other party was affected, misled, or prejudiced by the delay. . . .

614 F.2d at 702. (Citations omitted.) (Bracketed text in original.)

Applying these standards here, the facts establish a waiver. The Local was tardier in "raising" its arbitration defenses than were the defendants in *Simonds*, *Bath Iron Works*, or *Reid Burton I*. Indeed, the Local did more than simply acquiesce in the jurisdiction of the court here; it engaged in considerable discovery; it prepared the case for summary judgment; and it waited until after the district court had decided

that issue before it decided to advocate the propriety of arbitration. Thus, the Local was ready to accept the determination of the district court on the merits, actually moving the court to find summarily for it. It took actions inconsistent with its now-asserted right, delaying the enforcement of arbitration, and affecting, misleading, or prejudicing the Company by its delay. We therefore hold that in this case the court should have considered the merits of the underlying dispute.

III

Since both sides submitted this case to the district co rt for summary decision and since the case raises a single issue of contract interpretation, we shall decide that issue rather than remand this case to the district court for decision of that question. The question presented is simply whether the collective bargaining agreement permitted the Local to strike in response to the Company's dismissal of Pellerin or whether the agreement required the Local to go to arbitration instead. As we previously pointed out, the agreement consists of a Master Agreement and a Supplement.[6] After examining both sets of provisions, we have concluded that we need not face the question of which set predominates, *see* note 3, *supra*, for both sets forbid the strike.

The Master Agreement forbids all strikes except in four instances narrowly defined in Article 8(2)(a).[7] The Local does not argue that this strike falls within one of those four excep-

[6] In this regard, the strike provisions parallel the provisions governing remedies in the case of a strike, *see* note 3, *supra*, reflecting the natural *quid pro quo* of separate negotiations. As the Master Agreement was strongly pro-arbitration with regard to employer's remedies, so it is pro-arbitration with regard to strikes; only a narrow group of strikes are permitted. *See* note 11, *infra*. The Supplement, in contrast, provides for strikes in an additional category of cases and correspondingly permits broader employer remedies outside of arbitration.

[7] Master Agreement, Article 8(2)(a):

tions to the broad no-strike clause of the contract. The Supplemental Agreement makes no express addition to this short list of instances in which strikes are permitted, but Supplemental Agreement Article 46(5)(a) states that before taking certain emergency action "all grievances or disputes shall be taken up ... by the Employer and the Union Business Agent who shall make every attempt to settle same." Article 46(5)(b) states that "[t]he Employer shall take no disciplinary action until" the consultation of 46(5)(a) "has been complied with," and Article 46(5)(d) says that "failure of the Employer to comply [with 46(5)] ... shall be a violation of this Agreement and shall not be arbitrable...." The Local argues that the Company violated this article (46(5)) by "disciplining" Pellerin. And, since a violation by the employer is "not ... arbitrable," it can strike.

In evaluating the Local's interpretation, we are influenced

The parties agree that all grievances and questions of interpretation arising from the provisions of this Agreement shall be submitted to the grievance procedure for determination. Accordingly, except as specifically provided in other Articles of the National Master Freight Agreement, no work stoppage, slowdown, walkout or lockout shall be deemed to be permitted or authorized by this Agreement except:

(1) failure to comply with a duly adopted majority decision of a grievance committee established by the National Master Freight Agreement or Supplemental Agreement;

(2) a National Grievance Committee deadlock of a grievance rendered pursuant to the procedures provided herein; and

(3) failure to make health and welfare and pension payments in the manner required by the applicable Supplemental Agreement.

A "representation dispute" in circumstances under which the Employer is not required to recognize the Union under this Agreement is not subject to the grievance procedure herein and the provisions of this Article do not apply to such a dispute.

• • • •

We note that the Master Agreement seems to indicate that these categories of permitted strikes can be augmented only by provisions of the Master Agreement, not by a Supplement. But, as we previously stated, we do not need to reach the question of whether these provisions of the Master and Supplement conflict or which agreement prevails in the case of a conflict.

by the settled legal policies that favor arbitration of disputes and that require ambiguities in collective bargaining agreements to be resolved in favor of arbitration. *Steelworkers* v. *Warrior & Gulf*, 363 U.S. at 582-83. Moreover, clauses broadly permitting one party to be the unilateral determiner of whether arbitration is or is not required are disfavored. This corollary was made clear in *Warrior & Gulf* when the Supreme Court held that a clause providing that "mattters which are strictly a function of management shall not be subject to arbitration" did not empower the company to determine what functions were management functions within the scope of that clause. Rather, the union's claim that contracting out was a violation of the collective bargaining agreement raised "a dispute 'as to the meaning and application of the provisions of [the applicable] Agreement' which the parties had agreed would be determined by arbitration." *Id.* at 585. *See also Gateway Coal Co.* v. *Mine Workers*, 414 U.S. [illegible]8 (1974); *NAPA Pittsburgh, Inc.* v. *Chauffeurs, Local 926*, 363 F. Supp. 54 (W.D. Pa. 1973), *aff'd*, 502 F.2d 321 (3d Cir. 1974), *cert. denied*, 419 U.S. 1049 (1974); *Allied Division of Delaware Contractors Ass'n* v. *IOUE*, 351 F. Supp. 568 (D. Del. 1972), *aff'd*, 485 F.2d 678 (3d Cir. 1973); *Koster Bakeries* v. *Teamsters, Local 802*, 96 L.R.R.M. 3315 (E.D.N.Y. 1977).

In the present case, we need not consider whether or not the nonarbitrability of disputes over employer's actions *clearly* within Articles 46(5) (*e.g.*, whether discipline took place before 46(5)(a)'s discusions were complete) gives rise to a concomitant right to strike, for the Company denies that its actions bring it within Article 46(5). The Company's position is that it did not discipline Pellerin, but rather that Pellerin walked off the job and by so doing, according to industry custom, voluntarily quit the employer. We express, of course, no opinion on whether the Company's version of the events of December 18 is correct or whether the Local is correct in maintaining that Pellerin was discharged. There was,

however, undoubtedly a dispute over whether the Company's conduct brought it under Article 46(5) at all — a dispute highly analogous to the "management rights" question at issue in *Warrior & Gulf*. Given the analogy, it is apparent that the contract is at least ambiguous about whether disputes over what is "discipline" are nonarbitrable. And, we see nothing in, nor are we aware of any policy of, labor law suggesting that the Local should be able to determine unilaterally whether the Company actions in this case fall within Article 46(5). Rather, that question is a question about the interpretation of the contract. As such the contract requires that it be arbitrated:

> The parties agree that all grievances and questions of interpretation arising from the provisions of this Agreement shall be submitted to the grievance procedure for determination.

Master Agreement Article 8(2)(a).[8] Thus, in striking over the Pellerin dispute, instead of agreeing to submit it to arbitration, we believe that the Local violated the contract.

To hold otherwise, permitting the Local to decide for itself the lawfulness of strikes in advance of arbitration, would seem to "defeat the very purpose of the arbitration and no-strike provision," *Allied Division* v. *IOUE*, 351 F. Supp. at 571, and would be "at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Koster Bakeries* v. *Teamsters, Local 802*, 96 L.R.R.M. at 3317. We note further that the Eastern Conference of Teamsters, in a similar case, interpreted Article 46(5)(d) in a similar fashion. The record contains a letter signed by Joseph Trerotola, International Director, Eastern Conference of Teamsters, dated July 1, 1977, headed "Re: St. Johnsbury Trucking." It states:

> The facts, as we understand them, are as follows: The Company is instructing drivers to report for work three hours ahead of their regular starting times and treating as a voluntary quit the refusal to arrive as instructed.

[8] "Agreement" in this context must be taken as a reference to the combined Master and Supplemental Agreements. Master Agreement Article 1(3).

> Similarly, the Company is informing laid off employees that their failure to arrive for work the next day will also be treated as a voluntary quit.
>
> Article 46, Section 5, forbids the imposition of discipline prior to exhaustion of the grievance system. The Company's use of the phrase "voluntary quit" is an attempt to take their actions outside of the Section 5 procedure. *We do not believe that this enables the Local to strike rather than arbitrate. We believe a grievance is the safer solution.*

(Emphasis added.)

For the forgoing reasons, we reverse and remand the case to the district court with directions to enter summary judgment in favor of the plaintiff-appellant and to hear and determine the issue of damages.

Reversed and remanded.

Adm. Office, U.S. Courts — Addison C. Cockrell & Son, Inc.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Jones Motor Co., Inc.

v. Civil No. 80-5-D

Chauffeurs, Teamsters and Helpers, Local Union No. 633, et al

OPINION

The Court has before it plaintiff's motion for reconsideration of its Opinion dated February 19, 1981. At that juncture plaintiff Jones Motor Co., Inc. ("Company"), sought damages from defendant Local Union 633, *et al*, for allegedly violating the parties' collective bargaining agreement[1] by striking over the employment status of one of its members, Roger Pellerin. The Company moved for summary judgment urging this Court to find, as a matter of law, that the Union was bound to arbitrate the question of whether Pellerin voluntarily quit (the Company's position) or whether he was discharged (the Union's position) and that its strike in lieu thereof constituted a breach of contract. The Union filed a cross motion for summary judgment claiming that the Company itself breached the collective bargaining agreement by imposing discipline[2] before

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[1]The parties are signatories to the National Master Freight Agreement and New England Supplement thereto (hereinafter referred to as their collective bargaining agreement), which contract covers the wages, hours, terms and working conditions of employment of the Company's employees represented by the Union at its Nashua, New Hampshire, freight terminal.

[2]The Union did not make clear what it considered to be the "disciplinary action" taken, nor does the collective bargaining agreement define said term. We assume that the Union claims that either the alleged "discharge" constituted "disciplinary action", or that even if Pellerin voluntarily quit, the Company's refusal to allow him back on the job in and of itself constituted discipline.

conferring with the Union Business Agent, as it is required to do under Article 46, Sections 5(a) and 5(b) of the collective bargaining agreement. (*See* page [6] of this Opinion on which said sections are reproduced.) Since a violation of Section 5 is non-arbitrable,[3] the Union claimed that the Company thereby triggered an exception to the no-strike clause and that its strike was therefore justified.

In our Opinion of February 19, 1981, we found and ruled that the issue of which party, if either, breached the collective bargaining agreement was itself an arbitrable issue, for resolution of that question involves interpretation of various positions of the parties' collective bargaining agreement,[4] a task which both parties agreed by contract should be undertaken by the arbitrator. *See* Article 8, Section 1(a) of the agreement, which provides as follows:

> All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement (or factual grievances arising under the National Master Agreement), shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

By declining to rule on the merits of plaintiff's damage claim and instead requiring the parties to honor the collective bargaining agreement which they themselves entered into, this Court was attempting to uphold the letter and spirit of § 301 of the Labor-Management Relations Act.

> In passing § 301, Congress was interested in the enforcement of collective bargaining contracts

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[3]The Union's interpretation of Section 5(d) ("Failure on the part of an Employer to comply with Section 5 of this Article shall be a violation of this Agreement and shall not be arbitrable by the Joint Area Committee") is that a violation of Section 5(a) and 5(b) constitutes a violation of Section 5.

[4]The arbitrator might be asked to decide such issues as what constitutes "disciplinary action", whether a violation of Sections 5(a) and 5(b) constitutes a violation of Section 5, etc.

> since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.' (S. Rep. No. 105, 80th Cong., 1st Sess. 17.) It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456). The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§ 203[d] of the Act, 29 U.S.C. § 173[d]). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566).

Drake Bakeries Incorporated v. *Local 50, et al*, 370 U.S. 254, 263 (1962).

Plaintiff Company now urges this Court to reconsider its previous decision, citing two major reasons therefor. First, the Company claims that the parties' collective bargaining agreement nowhere requires the Company to seek arbitration of its claim; in fact, it is the Company's position that the agreement allows only the Union—and not the Company—to invoke the grievance and arbitration machinery. Therefore, the Company claims it is fully entitled to seek judicial relief without proceeding to arbitration.[4] Second, the Company asserts that even assuming *arguendo* that the collective bargaining agreement requires the Company to submit its claim to arbitration, the defendants have waived their right to insist that it do so because they never raised the issue that the Company's claim was

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[4]The Company cites in particular Article 46, Section 1(f), which provides: "... Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement."

arbitrable but instead admitted jurisdiction and "locked horns" in litigation by filing a cross motion for summary judgment. *See* Plaintiff's Motion for Reconsideration, dated March 9, 1981, and accompanying Memorandum of Law. The Court having addressed each of plaintiff's arguments below hereby reaffirms its earlier decision.

The Company's first contention, that it is neither allowed nor required by the parties' collective bargaining agreement to submit matters to arbitration is sufficiently undermined by the language of the contract itself, the pertinent parts of which the Court has set out below. For emphasis, the Court has underscored particular sections which belie the Company's position.

> ARTICLE 46, Section 1.
>
> The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of **any controversy** which might arise. Disputes shall first be taken up **between the Employer and the Local Union** involved. Failing adjustment by the parties, the following procedure shall then apply. [Sections (a) and (b) contain the appeals process.]
>
> (c) It is agreed that all matters pertaining to the interpretation of any provision of this Agreement may be referred by the Area Secretary for the **Union** and/or the Area Secretary for the **Employers at the request of either the Employers or the Union,** parties to the issue, with notice to the other Secretary, to the Northern New England Joint Area Committee at any time for final decision. . . . .
>
> . . . .

(e) Failure of the Joint Area Committee to meet without fault of the complaining side, refusal of **either** party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision withdraws the benefits of this Article.

. . . .

(g) The procedures set forth herein may be invoked only by the authorized Union Representative **or the Employer.**

(h) Complaints must be in writing to the Secretary of the Area Board and in such form as prescribed by the Board. Except as otherwise provided in this Agreement, and except for the payment of improper hourly or mileage rate, the Union on behalf of its members must file any claim for alleged violation of this Agreement not later than twenty (20) days after alleged violation was made known to the Union. The **Employer** must file any claim for alleged violation of this Agreement not later than twenty (20) days after alleged violation is made known to the Employer.[6]

ARTICLE 46, Section 4.

Grievances and questions of interpretation which are subjuect to handling under the provisions of Article 8 of the National Agreement shall be

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[6]The Court recognizes that said provision may present a bar to arbitration at this juncture, but it is well established that once a Court has decided that the parties are subject to an agreement to arbitrate, the issue of laches should be resolved by the arbitrator. *International Union Local 150, AFL-CIO* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), cited in *General Dynamics Corp.* v. *Local 5, et al*, 469 F.2d 848, 853 (1st Cir. 1972).

promptly referred to the National Grievance Committee in accordance with such Article 8.[7]

ARTICLE 46, Section 5

(a) Scope of Procedure.

Prior to the taking of any other than emergency action as contained in Sections (b) and (c) below, including resort to any court or administrative agency or tribunal, by either the Employer or the Local Union, all grievances or disputes shall be taken up and considered by the Employer and the Union Business Agent who shall make every attempt to settle same.

(b) No Disciplinary Action.

The Employer shall take no disciplinary action other than emergency action against an employee, or group of employes, until after Section 5(a) above has been complied with in good faith. Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then either party may take the unresolved question to arbitration as herein provided.

. . . .

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[7]The pertinent part of Article 8 is as follows:

ARTICLE 8, Section (2)(c)

[T]he question of whether the International Union, Teamsters National Freight Industry Negotiating Committee, an Area Conference, Joint Council or the Local Union, separately or jointly, participated in an unauthorized work stoppage, slow-down, walkout or cessation of work in violation of the Agreement by calling, encouraging, assisting or aiding such work stoppage, etc., in violation of this Agreement . . . shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action.

> (d) Must submit. Failure of Employer to comply non-arbitrable. Telegraphic request. **All disputes, complaints, or grievances, and any and all claims, demands, or actions growing therefrom, or involved therein, which are covered by the terms of this contract, or which pertain to labor relations between the contracting parties,** regardless of whether or not they are covered by the terms of this contract, and which the **Employer** has tried and been unable to settle with the Business Agent as per Section 5(a) of this Article, shall be submitted to the Joint Area Committee **by the complaining party.** Failure on the part of an Employer to comply with Section 5 of this Article shall be a violation of this Agreement and shall not be arbitrable by the Joint Area Committee, nor shall the provisions of Section 1 of this Article apply provided, however, that a written telegraphic request by the Union to the home office of the Employer involved is made.

In sum, a review of the above provisions reveals that the grievances and arbitration machinery may be (and in some instances **must** be) invoked by the Company as well as by the Union.

In regard to the Company's second claim that the Union has waived its right to require the Company to submit its claim to arbitration since it never filed a motion to stay proceedings pending arbitration, the Court states initially that it will not engage in speculation as to why the Union chose not to file such a motion except to point out that it is not at all clear that the Union would have deemed arbitration to be in its best interest. However, irrespective of the parties' pleadings, this Court is certainly not precluded from rendering the type of relief it finds most just[8] by ruling that

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[8]*See* Fed.R.Civ.P. 54(c). *See also* 6 Moore's Federal Practice ¶ 54.62, p. 1261.

arbitration is the forum agreed upon by the parties for disputes such as this. Therefore, plaintiff's motion for reconsideration must be and it hereby is denied.

SO ORDERED.

Chief Judge
United States District Court

April 20, 1981
cc: Harold N. Mack, Esq.
Ronald L. Snow, Esq.
Robert Christy, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Jones Motor Co., Inc.

v. Civil No. 80-5-D

Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;
Antonio Chloros, Individually and as Secretary-Treasurer of Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire;
Leo Kelly, Individually and as Business Representative of Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire

OPINION

Plaintiff in this action alleges that the defendants Local Union No. 633, et al, breached the Collective Bargaining Agreement between the parties by conducting a strike against the company instead of submitting the dispute to arbitration. Plaintiff originally filed a motion for a temporary restraining order contemporaneously with its complaint, but the need for such relief was precluded even before the hearing on said motion, since the strike was terminated. At this juncture the Court considers the parties' cross motions for summary judgment, having heard oral arguments on same, and having reviewed the depositions and affidavits submitted by the parties. The Court's jurisdiction is based on 28 U.S.C. § 1337, and upon § 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185.

THE FACTS

The plaintiff, Jones Motor Co., Inc. (hereinafter "the Company") is a Pennsylvania corporation engaged in the business of a common carrier, which has a freight terminal located in Nashua, New Hampshire. The Company is engaged in an industry affecting commerce as defined under the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 152. The defendant, Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "the Union") is a labor organization representing employees in an industry affecting commerce within the meaning of § 2 of the National Labor Relations Act, as amended, and § 301(a) of the Labor-Management Relations Act, 29 U.S.C. §§ 152 and 185(a). The Union has members who are employees of the Company. Defendant Antonio Chloros was at all times pertinent to this suit secretary-treasurer of the Union, and defendant Leo Kelly was the Union's Business Agent. Plaintiff and defendants are signatories to the National Master Freight Agreement and the New England Supplement thereto (hereinafter "contract"), which contract covers the wages, hours, terms, and working conditions of employment of the Company's employees represented by the Union at its Nashua, New Hampshire freight terminal. The term of said contract is April 1, 1979, to March 31, 1982.

The events which triggered the strike by the Union and subsequently this lawsuit occurred on the night of December 18, 1979, and the following day. Roger Pellerin, an employee of the Company and a member of the Union, began his 6:30 p.m. to 2:30 a.m. shift on the loading platform of the Company's Nashua, New Hampshire, freight terminal, along with another employee, Filteau. It was a very cold night. At approximately 8:30 p.m. Filteau entered the office of the supervisor, Joseph Lacourse, and told him that he was sick, and that he might have to leave early; at

10:00 p.m. Filteau was granted permission to leave. Pellerin continued to work by himself, occasionally entering the office to warm up. Pellerin did not stop working at 11:30 p.m. for his usual lunch break, but at approximately 11:45 he entered the office of Lacourse, had a brief conversation with Lacourse, punched out his time sheet, and left. What Pellerin uttered to Lacourse before his departure is a matter of dispute between the parties. Lacourse in his affidavit of December 28, 1979, recalls that Pellerin "told me he was leaving and was not coming back". Pellerin's version is that he felt frozen, weak, and chilled to the bone, and that

> I skipped my scheduled luncheon break and reported to supervisor Joseph Lacourse in the dispatcher's room that I was frozen, the cold was going right through me and had to go home because I couldn't take it anymore and wouldn't return for the balance of the shift. I interpreted Lacourse's basic silence as consent and went home at approximately 11:45 p.m. before my shift would otherwise have terminated at approximately 2:30 a.m.

See Pellerin's Affidavit, dated September 18, 1980. Lacourse recorded in the Company log book that Pellerin went home "frozen".

The next day at 6:00 p.m. Pellerin reported to work, as scheduled. He asked Lacourse where his time card was, and Lacourse responded that, in the opinion of the Company, Pellerin had voluntarily quit the night beofre. Earlier that day the terminal manager, Dunham, after conferring with Lacourse and the Union shop steward, Roland Bouffard,[1] had instructed Lacourse that Pellerin had quit, and that he was not to be allowed back to work.

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[1]Roland Bouffard, the Union shop steward, after listening to Lacourse's version of the events of the preceding evening, told Dunham, "He quit", referring to Pellerin. *See* Affidavit of Arthur Dunham, dated December 28, 1979.

On December 20, 1979, the Company received a telegram from the Union threatening unspecified action against the Company unless it reinstated Pellerin, its position being that Pellerin had not quit, but had gone home sick. On December 26, 1979, Kelly telephoned Charles Long, the Company's vice-president for labor relations, to advise him that the Union would take economic action unless the Company immediately reinstated Pellerin. Long responded that it was his understanding that Pellerin had quit, and he stated that the Company was willng to have the question of Pellerin's status submitted to the Northern New England Joint Area Committee which was scheduled to meet on January 4, 1980.[2] Kelly refused this suggestion.

On December 27, at approximately 7:00 a.m., Kelly called a strike and established a picket line in front of the Company's Nashua terminal. The Company then sent a telegram to the Union urging it to terminate the strike and submit the dispute over Fellerin's status to arbitration. The strike ended on January 4, 1980, one day after plaintiff filed in this court a Motion for Temporary Restraining Order.

On January 4, 1980, the Union submitted a grievance in behalf of Pellerin to the Northern New England Joint Area Committee, which deadlocked on it. The grievance thereafter was submitted to the Eastern Conference Joint Area Committee for resolution, pursuant to Article 46, Section 1(b), of the Collective Bargaining Agreement. That body decided that Pellerin should be reinstated with full seniority on June 2, 1980, but that the preceding six months should be considered as a suspension for which no compensation, health and welfare, or pension contributions would be made. The Committee also decided to issue a final warning letter to Pellerin in reference to walking off the job.[3]

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[2]Under the collective bargaining agreement of the parties, Article 46, Section 1, this body resolves grievances.

[3]See Plaintiff's Exhibit G.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Company now seeks damages resulting from the Union's strike which the Company claims was prohibited by the parties' Collective Bargaining Agreement.[4] According to plaintiff, said Agreement requires that the Union submit any complaints it might have to the arbitration process outlined in the Agreement. Plaintiff claims that the Union's decision to strike over Pellerin's job status in lieu of arbitration constituted a breach of the Collective

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[4]The "no-strike" clauses in the parties' Collective Bargaining Agreement are found in Articles 8 and 46; Article 8, Section 2, provides in pertinent part:

> (a) The parties agree that all grievances and questions of interpretation arising from the provisions of this Agreement shall be submitted to the grievance procedure for determination. Accordingly, except as specifically provided in other Articles of the National Master Freight Agreement, no work stoppage, slowdown, walkout or lockout shall be deemed to be permitted or authorized by this Agreement except: [the listed exceptions are inapplicable to the instant case].

Article 46 provides, in pertinent part [Section 1]:

> The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:
>
> (a) Where the Northern New England Joint Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Eastern Conference Joint Area Committee. Such a decision will be final and binding on both parties.
>
> (b) Where the Northern New England Joint Area Committee is unable to agree to come to a decision on a case, it shall be submitted or appealed to the Eastern Conference Joint Area Committee at the next regular constituted session, at the request of the Employer or Union involved, except as otherwise provided in (d) below. Where the Eastern Conference Joint Area Committee, by a majority vote, settles a dispute, such decision shall be final and binding on both parties with no further appeal.

Bargaining Agreement, which entitles the Company to summary judgment in its favor, inasmuch as this Court must decide, as a matter of law, that such disputes are arbitrable under the parties' contract. The Union counters that "[t]he issue of whether or not Pellerin went home frozen, sick, or just plain quit is critical to resolution of this case". (*See* Defendants' "Memorandum in Support of Motion to Dismiss and/or for Summary Judgment".) Notwithstanding its contention that there exists a material fact at issue, the Union urges summary judgment[8] in its behalf, claiming that it was the Company—and not the Union—which violated the Collective Bargaining Agreement. By refusing to allow Pellerin to return to work without first conferring with the Union Business Agent the Company allegedly violated Article 46, Sections 5(a) and 5(b), which provide that no disciplinary action (other than emergency action) shall be taken by the Company before conferring with the Union Business Agent. Said sections provide:

> (a) Scope of Procedure.
>
> Prior to the taking of any other than emergency action as contained in Sections (b) and (c) below, including resort to any court or administrative agency or tribunal, by either the Employer or the Local Union, all grievances or disputes shall be taken up and considered by the Employer and the Union Busines Agent who shall make every attempt to settle same.
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> (b) No Disciplinary Action.
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> The Employer shall take no disciplinary action other than emergency action against an employee, or group of employees, until after Section 5(a) above has been complied with in good faith.

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[8]We construe defendant's motion as one for summary judgment, in that affidavits in support thereof have been submitted to the Court.

> Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then either party may take the unresolved question to arbitration as herein provided.

To justify its choice of striking versus arbitrating the Union points to Article 46, Section 5(d), which states that "[f]ailure on the part of an Employer to comply with Section 5 of this Article . . . shall not be arbitrable by the Joint Area Committee".[6]

THE LAW

The issue which this Court has been asked to resolve is: Did the Union breach the Collective Bargaining Agreement between the parties by striking rather than arbitrating the dispute over Pellerin's job status, or was the Union relieved of its duty to arbitrate by the Company's alleged violation of Section 5? Before we can answer this underlying question, it is imperative to make a more elementary inquiry about our power to grant the requested relief.

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a), gives this Court jurisdiction over suits for

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[6]Section 5(d) provides in full:

> Failure of employer to comply non-arbitrable. Telegraphic request. All disputes, complaints, or grievances, and any and all claims, demands, or actions growing therefrom, or involved therein, which are covered by the terms of this contract, or which pertain to labor relations between the contracting parties, regardless of whether or not they are covered by the terms of this contract, and which the Employer has tried and been unable to settle with the Business Agent as per Section 5(a) of this Article, shall be submitted to the Joint Area Committee by the complaining party. **Failure on the part of an Employer to comply with Section 5 of this Article shall be a violation of this Agreement and shall not be arbitrable** by the Joint Area Committee, nor shall the provisions of Section 1 of this Article apply provided, however, that a written telegraphic request by the Union to the home office of the Employer involved is made. [Emphasis added.]

violations of contracts between employers and labor organizations. The policy behind the Act was to "promote a higher degree of respnsibility upon the parties to such [collective bargaining] agreements", and thereby to "promote industrial peace", S. Rep. No. 105, 80th Cong., 1st Sess. 17, by placing "sanctions behind agreements to arbitrate grievance disputes", *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957), cited in *Drake Bakeries, Inc.* v. *Local 50, American Bakery*, 370 U.S. 254, 263 (1962). Thus, in passing the Act, Congress intended to encourage and strengthen the collective bargaining process, not to strip arbitrators of any decision-making power. In exercising this power, "courts must avoid reaching the merits of arbitration disputes; their function is to make a determination that underlying issues may be arbitrable". *Drivers, Chauffeurs* v. *Akins*, 582 F.2d 1336 (4th Cir. 1978). Whether the parties agreed to arbitrate certain issues must be answered within the framework of their collective bargaining agreement. *Willo Packing Co., Inc.* v. *Butchers Food Handlers*, 450 F. Supp. 598, 599 (S.D.N.Y. 1978).

In this case, Article 8, Section 1, of the parties' Collective Bargaining Agreement defines the issues which must be arbitrated:

> All grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.
>
> (a) All factual grievances or questions of interpretation arising under the provisins of the Supplemental Agreement (or factual grievances arising under the National Master Agreement), shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

We find that a determination of whether the Union breached the Collective Bargaining Agreement necessitates the resolution of factual grievances and questions of contract interpretation which fall within the purview of the above arbitration clause. Under the parties' Agreement, it is not for this Court to decide, for example, whether an employee quit or was discharged from his job (a factual grievance); or whether a violation of Article 46, Section 5(a), constitutes a violation of "Section 5", thus rendering such a violation "non-arbitrable" pursuant to Section 5(d) (a question of contract interpretation). Rather, such questions should be resolved in the manner agreed upon by the parties, *i.e.*, through arbitration.

We find support for this decision in the United States Supreme Court case of *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers, Int'l, supra,* 370 U.S. 266 (1962). In *Drake Bakeries,* the petitioning Company alleged that the Union had violated the no-strike clause of the parties' collective bargaining agreement, which agreement contained a broad arbitration clause,[6] similar to the arbitration clause in the instant case. In view of this broad arbitration clause, the Supreme Court decided that the question of whether the Union breached the no-strike clause was a proper question for the arbitrator, not the district court. In *General Dynamics Corporation* v. *Local 5,* 469 F.2d 848 (1st Cir. 1972), the First Circuit reviewed a district court's denial of damages to the plaintiff Company for an alleged breach of the no-strike clause in their agreement. In that case the Company admitted that

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[6]The arbitration clause in *Drake Bakeries, supra* at 1348, n.2, is, in part, as follows:

> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

the issue of breach was arbitrable, but claimed that it no longer was rquired to submit the issue to arbitration because the Union had repudiated the arbitration provision. The First Circuit held that whether the Union repudiated the Agreement's arbitration clause was itself a matter for arbitration under the contract of the parties, and thus that the district court had properly denied the Company's request for damages. *See also H & M Cake Box, Inc.* v. *Bakery and Confectionary Workers International Union of America, Local No. 45,* 493 F.2d 1226 (1st Cir. 1974). In a more recent decision, *Latas Libby's, Inc.* v. *United Steelworkers,* 609 F.2d 25 (1st Cir. 1979), the First Circuit affirmed the district court's award of damages to a company for breach of a no-strike clause by the union. But the Court specifically noted in a footnote that the facts of that case differed from *Drake Bakeries, Inc.* v. *Local 50, supra,* in that the intent of the parties was "to provide for arbitration only in the case of employee-initiated grievances .... Thus, a dispute precipitated by the Union's violation of the no-strike provision need not be submitted to arbitration." *Latas, supra* at 28, n.4.

The corollary to the above footnote in the *Latas* decision is that in those cases such as *Drake Bakeries,* wherein the parties have provided for both employee- and employer-initiated grievances, such disputes must be submitted to arbitration. The Collective Bargaining Agreement in the instant case provides for just such a procedure:

> Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then **either party may take the unresolved question to arbitration as herein provided.**

Article 46, Section 5(b) (emphasis added). Thus, we follow the holding of *Drake Bakeries, supra,* and its progeny which compel us to practice judicial modesty by stepping aside and

honoring the agreement of the parties to arbitrate such issues as the one posed herein. We part ways with the Supreme Court in *Drake Bakeries* only insofar as the ultimate relief ordered, since unlike the lower court in *Drake Bakeries* we do not have before us a motion for a stay pending arbitration. Therefore, we follow the lead of the First Circuit in *General Dynamics Corp* v. *Local 5, supra,* in which it affirmed the district court's dismissal of the action.[7]

In conclusion, although we have made a determination herein that the issue of which party (if either) breached the Collective Bargaining Agreement is an arbitrable issue, we have left it to the parties to decide for themselves whether to pursue that course of action. Our holding today is merely that at this juncture the district court is an inappropriate forum for the resolution of the parties' dispute.

SO ORDERED.

Chief Judge
United States District Court

February 19, 1981

cc: Harold N. Mack, Esq.
Ronald L. Show, Esq.
Robert Christy, Esq.

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[7]In *General Dynamics*, the plaintiff Corporation asked the First Circuit to stay the action pending arbitration rather than to affirm the district court's dismissal in the event that the Court were to find arbitration necessary. Plaintiff argued that the case of *Drake Bakeries* compelled this result. The First Circuit disagreed, saying:

> [t]hat case [*Drake Bakeries*] was decided in the district court on a motion for a stay pending arbitration and thus the only alternatives before the Supreme Court were affirmance or reversal of the stay. . . . we believe the district court properly denied the plaintiff's request and dismissed the action.